UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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April 17, 2002

Grassroots Groups Now Thrive Under the Constitution

Can the Government Lawfully Prohibit You From Speaking Until You Change Your Identity and Get New Friends?

The campaign finance "reform" act which the President recently signed, Pub. L. 107-155, prohibits the broadcasting of certain words in the weeks before an election – dangerous words like the names of candidates running for Federal office, irrespective of the context in which the names are uttered.

"But, hold on," say supporters of the act, "it's *not true* that names of candidates cannot be broadcast. Anybody can broadcast any word they want," they say, "including a name of a candidate, *so long as they use government-regulated money*." This argument has been heard many times since passage of the act. Its supporters apparently believe they have found a sufficient answer to the charge that the act censors political speech.

In truth, the supporters' description of their act is absolutely correct, but it is *no* answer to the charge of censorship: **To say that an organization can say anything it wants so long as it reorganizes and renames itself; appoints new corporate officers; raises money only from certain people in certain amounts (and discloses to the world the identity of those persons); files regular reports with the government showing where it got its money and how it spent it; and otherwise complies with a comprehensive regime of regulation, is *not* to refute the charge of censorship but to confirm it.**

This is not new ground. Some 20 years ago, the Federal Election Commission (FEC) tried to compel the nonprofit corporation, Massachusetts Citizens for Life (MCFL), to stop using its general treasury funds to pay for independent political speech "in connection with" a federal election. See, 2 U.S.C. §441b. **The Commission sought to justify the rule by arguing that the corporation "remained free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors, that may be used for unlimited campaign spending." In *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Supreme Court *rejected* the FEC's argument because "the practical effect" of the**

statute was "to make engaging in protected speech a severely demanding task."

The Court said the law imposed a "substantial" restriction on speech which would have required "very significant efforts" to overcome. *Id*. at 252. The Court could find no compelling governmental justification for the restriction, *id*. at 263, and it struck down the law *as applied* to MCFL, an "ideological" corporation that does not engage in business activities, that has no shareholders or others with a claim on its assets or earnings, and that was not established by a business corporation or labor union and does not accept contributions from either.

In Washington, D.C., which is brimful of lawyers, consultants, and spinmeisters making big bucks, it is sometimes easy to forget the costs that the law imposes on individuals and small organizations – and those costs cannot always be measured in dollars.

In the *Massachusetts Citizens for Life* case, the Supreme Court described some of the steps that MCFL would have had to take if the Federal Election Commission had prevailed (see 479 U.S. at 253-54). Because MCFL is a corporation, it would have had to make the following changes before it could publish its own express political opinions in its own newspaper:

- MCFL would have had to establish a "separate segregated fund" to engage in any independent spending. Because such a fund is considered a "political committee" under the Federal Election Campaign Act, any independent expenditure by MCFL would be regulated as though the organization's major purpose was to further the election of candidates.

- MCFL would have had to appoint a treasurer and ensure that contributions were forwarded to the treasurer within days of receipt. The treasurer would have to keep an account of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, and all contributions received from political committees. Also, a record would have to be kept with the name and address of any person to whom a disbursement is made regardless of amount, and receipts for all disbursements over $200 would have to be kept for three years.

- MCFL would have to file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories, and report any change within 10 days.

- MCFL would have to file reports with the FEC containing information regarding the amount of cash on hand, the total amount of receipts, detailed by 10 different categories, the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing

rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200.

- Reports to the FEC also would contain information on the total amount of all disbursements, detailed by 12 different categories, the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made, persons to whom loan repayments or refunds have been made, the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.

- MCFL would be permitted to solicit contributions for its separate segregated fund *only* from its "members," which does not include those persons who have merely contributed to or indicated support for the organization in the past. See, *FEC v. National Right to Work Committee*, 459 U.S. 197, 204 (1982).

Also, in addition to the requirements identified by the Court in 1986, the new law, Pub. L. 107-155, imposes additional demands.

What are the practical effects of such regulations on a small, grassroots organization? The Supreme Court said:

> "It is evident from this survey that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to 'members' vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech. It is not unreasonable to suppose that, as in this case, an incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." 479 U.S. at 254-55 (footnotes omitted).

Is it any wonder that the Court held the Federal Election Campaign Act unconstitutional as applied to MCFL? The Constitution of the United States does not permit the FEC to monitor receipts from garage sales to ensure that a grassroots organization is not using "tainted" money to give a speech.

The campaign "reform" act boldly confronts some of the Supreme Court's interpretations of the First Amendment – but unless the Court changes directions, key parts of the act seem constitutionally doomed.

MCFL taught that nonprofit, "ideological" corporations cannot be forced to reorganize before speaking, even if their speech expressly advocates the election or defeat of a candidate. The "reform" act challenges that holding.

Other cases teach that for-profit corporations cannot be prohibited from using their general treasuries to speak on issues, even if their speech uses the name of a candidate for Federal office (so long as they do not expressly advocate the election or defeat of a candidate). The "reform" act challenges those holdings.

Section 403 of the "reform" act provides for expedited judicial review, first at a three-judge Federal court in the District of Columbia, and then directly to the Supreme Court. It shouldn't take too many months to learn if the Supreme Court is going to change directions. Whichever direction the Supreme Court takes, however, the First Amendment will still read, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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Note: The *MCFL*-quotations in this paper are taken from part III-A of Justice Brennan's opinion for the Court; however, only four justices concurred in that part of the opinion. Technically, therefore, part III-A represents the views of a plurality of the Court. Justice O'Connor wrote a separate concurring opinion explaining that she did not join part III-A because she believed that Brennan's opinion "may be read as moving away from the teaching of *Buckley v. Valeo*, 424 U.S. 1 (1976)" that "reporting and disclosure requirements" had a "chilling effect" *not only* "on an organization's contributors, 424 U.S. at 66-68," *but also* on "a group's own speech, 424 U.S. at 74-82." 479 U.S. 265-66 (O'Connor, J., concurring). In *MCFL*, four justices supported the law and the language that we have quoted, and Justice O'Connor was more – not less – committed to protecting the "group's own speech."